No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* TAKINGS AND FEDERAL COURTS SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed in the appendix to this brief, are academics who focus their teaching and research on takings and/or federal courts law.[2] Their principal interest in this case is in the proper application of the law.

SUMMARY OF ARGUMENT

The question presented in this case is whether a property owner may file a federal taking claim in federal court without first seeking compensation under state law in state court. This brief responds to two points in the United States' brief as *amicus curiae*. The Solicitor General suggests that the Court should exercise jurisdiction over petitioner's state-law inverse-condemnation claim under 28 U.S.C. § 1331. The Court should reject this suggestion. This case is not in the "special and small category of cases" in which a state-law cause of action is held to "arise under" federal law. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)).

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for any of the parties authored any part of this brief, and no person or entity other than the counsel and *amici* submitting this brief has made any monetary contribution to the preparation or submission of this brief.

[2] The views expressed by *amici* are their own and do not reflect the views of their employers.

The Solicitor General also raises the possibility that petitioner may pursue a claim directly under the Fourteenth Amendment in federal court. The Court should not decide this complex question here because it was not aired in the lower courts and because Pennsylvania law provides petitioner a statutory cause of action to recover compensation. *See* 26 Pa. Cons. Stat. Ann. § 502(c) (2006). If the Court opts to address this issue, it should hold that petitioner may not pursue a cause of action directly under the Fourteenth Amendment. Implying a cause of action under Section 1 of the Fourteenth Amendment would conflict with Section 5, which delegates authority to enforce the Amendment to Congress. Even if Section 1 provides a cause of action in some circumstances, it does not in cases like the one at bar in which state law provides an adequate means of redress.

ARGUMENT

I. THE DISTRICT COURT CANNOT EXERCISE JURISDICTION OVER A STATE-LAW INVERSE-CONDEMNATION CAUSE OF ACTION UNDER 28 U.S.C. § 1331.

The Solicitor General suggests (U.S. Br. 22-27) that the district court should exercise jurisdiction over petitioner's potential state-law inverse-condemnation cause of action under 28 U.S.C. § 1331.[3] This argument

[3] Petitioner did not allege jurisdiction over any state-law claim under Section 1331. *See* Pet. Br. 12, 27; *see also Merrell Dow*

attempts to circumvent the holding in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985), that a property owner may not bring a federal taking claim against a municipality without first seeking compensation available under state law. The Solicitor General argues (U.S. Br. 7) that *Williamson County* applies only to claims under 42 U.S.C. § 1983, leaving federal courts free to exercise jurisdiction over state-law causes of action under 28 U.S.C. § 1331.

Section 1331 grants district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." This Court has "disclaimed the adoption of any bright-line rule" to govern Section 1331. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 317 (2005). Instead, Section 1331 is interpreted "with an eye to practicality and necessity," *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 20 (1983), "in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959), *superseded by statute on other grounds*, 45 U.S.C. § 59.

Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.").

A state law cause of action may "arise under" federal law for purposes of Section 1331 only in a "special and small category of cases." *Gunn*, 568 U.S. at 258 (quoting *Empire Healthchoice*, 547 U.S. at 699). "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 813. Rather, that narrow category is limited to cases in which "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314; *see also Gunn*, 568 U.S. at 258.

This case does not meet that test. First, this is not a case in which "the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Merrell Dow*, 478 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 9). Title 26 of the Pennsylvania statutes, the Eminent Domain Code, provides a detailed and comprehensive procedure for property owners to obtain compensation for any condemnation of property. *See* 26 Pa. Cons. Stat. Ann. § 102 (2006). Petitioner may claim compensation in state court under 26 Pa. Cons. Stat. Ann. § 502(c) (2006). *See Cowell v. Palmer Twp.*, 263 F.3d 286, 290 (3d Cir. 2001). Resolving that claim would not require resolution of any federal question or even reference to any federal case law. This case, like most takings cases against municipalities, can be and properly is resolved as a matter of state law. *See* Kathryn E. Kovacs, *Accepting the Relegation*

of Takings Claims to State Courts, 26 Ecology L.Q. 1, 34-47 (1999).

The Solicitor General asserts that such a state inverse-condemnation action "necessarily raises a federal question because it rests on the assertion that the property owner has been subjected to a taking of his property under the Fifth Amendment." U.S. Br. 24 (internal quotation marks and citation omitted). To the contrary, under Pennsylvania law, such a claim turns on whether 1) the municipality has the power of eminent domain, 2) exceptional circumstances substantially deprived the plaintiff of the use and enjoyment of her property, and 3) the municipality's intentional action immediately, necessarily, and unavoidably damaged the plaintiff's property. *In Re Mountaintop Area Joint Sanitary Auth.*, 166 A.3d 553, 561, 562 (Pa. Commw. Ct. 2017). A survey of Pennsylvania inverse-condemnation case law reveals that Fifth Amendment and federal takings cases are rarely cited much less "necessary" to the analysis, and the Solicitor General cites no authority to the contrary. Therefore, this is not the sort of rare case in which the federal courts may exercise jurisdiction over a state law claim under Section 1331. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016) (explaining that typically in such cases "the claim's very success depends on giving effect to a federal requirement").

Second, even if petitioner's potential state inverse-condemnation claim were to raise a federal issue, that issue would not be "substantial in the relevant sense."

Gunn, 568 U.S. at 260. Whether an issue is "substantial" in this context depends on "the importance of the issue to the federal system as a whole." *Id.* In *Gunn*, a federal patent-law issue was an element of the plaintiff's state-law legal malpractice claim. Indeed, the crux of the dispute was whether, in the absence of malpractice, the plaintiff would have prevailed in his federal patent infringement case. *Id.* at 259. Yet, the Court held that the claim did not "arise under" federal law because the federal issue was not substantial. *Id.* at 264. Allowing state courts to resolve such cases would not undermine the uniformity of federal law. *Id.* at 261. The possibility that a state court might decide a state-law claim incorrectly, the Court said, is not enough to trigger federal jurisdiction, "even if the potential error finds its root in a misunderstanding of [federal] law." *Id.* at 263. The same is true here. The run-of-the-mill municipal takings case has little bearing on the federal system as a whole, but the scope and consequences of municipal regulation are of tremendous import to state and local governments.

Contrary to the Solicitor General's representation (U.S. Br. 24), in neither *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), nor *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), did the Court's decision rest on the view that the federal issue was important. Rather, the Court in *Smith* allowed jurisdiction under Section 1331 because the plaintiff's right to relief depended upon the constitutionality of a federal statute. 255 U.S. at 199, 201; *see also Gunn*, 568 U.S. at 261; *Grable*, 545 U.S. at 312;

Merrell Dow, 478 U.S. at 809 n.5 & 814 n.12. In *City of Chicago*, respondent alleged in state court that the City's landmark ordinance violated the Due Process, Equal Protection, and Just Compensation Clauses of the U.S. Constitution. 522 U.S. at 160. "[T]he federal constitutional claims were raised by way of a cause of action created by state law, namely, the Illinois Administrative Review Law." *Id.* at 164. This Court endorsed the City's removal of the case to federal court because the claims "unquestionably" arose under federal law. *Id.* Although respondent pled only a state-law cause of action, "by raising several claims that arise under federal law, [respondent] subjected itself to the possibility that the City would remove the case to the federal courts." *Id.* Thus, *City of Chicago* stands for the well-established proposition that plaintiffs cannot defeat federal jurisdiction through artful pleading that omits federal questions necessary to their claims. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998).

Third, exercising jurisdiction over state-law claims for compensation from political subdivisions of the state under Section 1331 would disturb the "balance of federal and state judicial responsibilities," *Grable*, 545 U.S. at 314, and raise federalism concerns. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). This Court explained in *Merrill Lynch*, that it consistently construes federal jurisdictional statutes narrowly, reflecting the Court's "deeply

felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes." 136 S. Ct. at 1573 (quoting *Romero*, 358 U.S. at 379). The Court has "reiterated the need to give '[d]ue regard [to] the rightful independence of state governments' – and more particularly, to the power of the States 'to provide for the determination of controversies in their courts.'" *Id.* (quoting *Romero*, 358 U.S. at 380). Keeping state-law inverse-condemnation claims in state courts serves to "help maintain the constitutional balance between state and federal judiciaries." *Id.*

The Solicitor General's reliance (U.S. Br. 23, 24, 25) on *Grable* is misplaced. There, an essential element of the plaintiff's state-law quiet title claim was whether the Internal Revenue Service had given the plaintiff sufficient notice of the seizure of its property under a federal statute. 545 U.S. at 315. Indeed, the construction of the federal statute was "the only legal or factual issue contested" in *Grable*. *Id.* The Court found the federal interest in adjudicating that issue strong and the potential impact on the division of labor between state and federal courts "microscopic." *Id.*

Here in contrast, there is little federal interest in adjudicating local land-use disputes. This Court has recognized that land-use regulation "is a quintessential state and local power," *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality), and "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal

questions related to zoning and land-use regulations." *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 347 (2005). *See generally* Kovacs, *supra*, at 38-47. Whatever federal interest there is in such cases can be satisfied by this Court's review of state court judgments. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618 (2013); *see also Merrell Dow*, 478 U.S. at 816 ("even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action").

In addition, opening the federal courthouse doors to these claims could shift the division of labor from state to federal courts markedly. Congress balanced the roles of the state and federal courts in taking cases when it enacted Section 1983. That statute makes the federal courts the appropriate forum for enforcing the Fourteenth Amendment. It does not, however, give the federal courts the authority to address non-constitutional injuries, such as the taking of property, which only violates the Constitution if the government denies compensation. *See* Resp. Br. 22-23. The Court should reject the Solicitor General's attempt to make an end-run around the issue here. "This case cannot be squeezed into the slim category *Grable* exemplifies." *Empire Healthchoice*, 547 U.S. at 701.

II. PETITIONER MAY NOT ASSERT A CAUSE OF ACTION UNDER THE FOURTEENTH AMENDMENT.

A. The Court should not address this complicated issue because an *amicus* party mentioned it for the first time in this Court.

The Solicitor General suggests (U.S. Br. 27 n.8) that it is an open question whether the Fifth Amendment provides a cause of action. The availability of an inverse-condemnation cause of action against a state or municipal government based solely on the Fifth Amendment, independent of 42 U.S.C. § 1983, however, would not assist petitioner. Such a cause of action still would be subject to the requirement that a property owner first resort to state-law compensation mechanisms, because that requirement flows from the constitutional text itself. *Williamson County*, 473 U.S. at 194. Nor does the Solicitor General affirmatively advance the argument that petitioner may assert a cause of action directly under the Fifth Amendment. Rather, the Solicitor General reiterates the argument that the federal district court may assert jurisdiction over a state-law inverse-condemnation claim under Section 1331.

The Court should not resolve this question here because petitioner did not assert a claim based on the Fifth Amendment itself, *see* J.A. 92, 93, 101 (bringing claim under 42 U.S.C. § 1983); *see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon. . . ."), and thus the issue

was not developed in the lower courts. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (declining to address an issue of "importance" in the "absence of briefing and decisions by the courts below").

Moreover, the question of whether petitioner could assert a cause of action under the U.S. Constitution would require the Court to resolve issues that the Solicitor General does not mention. Even if the Fifth Amendment provides a cause of action against the United States, to resolve this case, the Court would have to determine further whether the Fourteenth Amendment incorporates that cause of action against the states or creates a cause of action on its own.[4] *See Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243, 247-48 (1833) (holding that the Fifth Amendment does not apply to states directly).

This Court is hesitant to create implied causes of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). In the constitutional field, there is "even greater reason" to avoid implied causes of action than in the statutory field "since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Implying a cause of action under the Constitution raises separation-of-powers concerns. *Ziglar v. Abbasi*, 137 S. Ct.

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[4] The Court also might have to determine whether the Fourteenth Amendment's cause of action applies to takings caused by local land-use regulations. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

1843, 1857 (2017). This Court generally considers Congress to be the branch more suited to weighing the many factors involved in determining whether a new cause of action would serve the public interest. *Id.* at 1857-58.

Engaging in these inquiries is unnecessary here because Pennsylvania law provides petitioner a statutory cause of action to recover compensation. *See* 26 Pa. Cons. Stat. Ann. § 502(c). That statute provides a "'reasonable, certain and adequate provision for obtaining compensation,'" *see Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)); *see also* U.S. Br. 28 n.8 ("Pennsylvania has provided a statutory cause of action that allows owners to recover the full measure of compensation required by the Fifth Amendment"), and adequate reason not to decide whether petitioner could pursue an alternate, unpled cause of action under the Fourteenth Amendment. *Cf. Ziglar*, 137 S. Ct. at 1858 ("if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action"); *Malesko*, 534 U.S. at 72 (declining to imply a right of action where "claimants in respondent's shoes [did not] lack effective remedies").

B. Petitioner cannot state a claim under the Fourteenth Amendment.

If the Court opts to address this issue, it should conclude that the Fourteenth Amendment does not

incorporate or create a cause of action to seek just compensation against subdivisions of states in federal court.

If Section 1 of the Fourteenth Amendment provided a cause of action, there would be no need for Section 5, which expressly delegates to Congress the authority "to enforce, by appropriate legislation, the provisions of" the Amendment. That authority includes the power to create "private remedies against the States for actual violations" of the Fourteenth Amendment and the rights it incorporates. *United States v. Georgia*, 546 U.S. 151, 158 (2006) (concerning Eighth Amendment claim) (emphasis omitted). Section 1 should not be read to negate the plain language of Section 5 delegating enforcement authority to Congress. As the Court explained shortly after the Amendment's enactment, "[s]ome legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate . . . is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).[5]

Congress has enacted appropriate legislation: 42 U.S.C. § 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities, secured

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[5] This Court has stated that the "constitutional provision with respect to compensation" in the Fifth Amendment is "self-executing." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 315 (1987). That cannot be true of the Fourteenth Amendment, however, because Section 5 expressly delegates enforcement of the Amendment to Congress.

by the Constitution and laws" of the United States. The "party injured" may bring "an action at law, suit in equity, or other proper proceeding for redress," 42 U.S.C. § 1983, against a municipality. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). This includes a property owner filing suit under Section 1983 against a local government alleging a taking without just compensation. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (allowing claim to proceed where state law did not provide a means of obtaining compensation). In Section 1983, Congress intended to provide a federal remedy where state law was inadequate or where state law, "though adequate in theory, was inadequate in practice." *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980). "In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Id.* at 101.

Reading Section 1 of the Fourteenth Amendment to provide a cause of action directly would render Section 1983 superfluous and evade the requirements Congress imposed in Section 1983. Consequently, this Court has been reluctant to "imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983." *Monell*, 436 U.S. at 712 (Powell, J., concurring) (quoting *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 278 (1977)); *see also, e.g., Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979); *Aldinger v. Howard*, 427 U.S. 1, 4 n.3 (1976), *superseded by statute on other grounds*, 28 U.S.C. § 1367.

Even if the Fourteenth Amendment provides a cause of action in some circumstances, it does not do so where state law provides a "'reasonable, certain and adequate provision for obtaining compensation.'" *See Preseault*, 494 U.S. at 11 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. at 124-25). The due process component of the Fourteenth Amendment proscribes state and local government takings of private property for public use without just compensation. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236, 241 (1897). By its plain terms, the Fourteenth Amendment's Due Process Clause prohibits states to "deprive a person of life, liberty or property without due process of law."[6]

In this case, petitioner has not been deprived of due process because state law provides an adequate avenue for her to obtain compensation for any taking that may have occurred. *Cf. Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding state action under the Fourteenth Amendment's Due Process Clause "is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy"). As the Court explained in *Zinermon v. Burch*, 494 U.S. 113 (1990),

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[6] The requirement that states provide a procedure for property owners to seek compensation for takings is best seen as a procedural obligation. *See* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1110-11 (2001). The adequacy of compensation paid might implicate substantive rights. Regardless of whether petitioner's hypothetical Fourteenth Amendment claim is seen as substantive or procedural, however, a necessary component of that claim is that respondent "deprive" her of due process.

depriving a person of "'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Id.* at 125 (emphasis in original). Post-deprivation remedies satisfy due process where "they are the only remedies the State could be expected to provide." *Id.* at 128 (citing cases); *see also Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995) (holding, in the tax context, that "[a]s long as state law provides a clear and certain remedy, the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)" (internal quotes and citations omitted)).

In cases seeking compensation for the effects of local land-use regulations, usually pre-deprivation process is not possible because the government will not know before enactment whether its regulation will take a particular individual's property to an extent that requires compensation. *Cf.* U.S. Br. 8-16 (arguing that the Just Compensation Clause does not require contemporaneous compensation). In this case, respondent's request for compensation is dubious. *See Brown v. Lutheran Church*, 23 Pa. 495, 500 (1854) ("the sanction of mankind in all ages . . . regards the resting-place of the dead as hallowed ground – not subject to the laws of ordinary property"); Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 B.Y.U. L. Rev. 1469 (2006). In any event, respondent effectively proffered just compensation via the Pennsylvania Eminent Domain Code when it enacted

the challenged ordinance. That is all the plain language of the Fourteenth Amendment's Due Process Clause requires. *See City of W. Covina v. Perkins*, 525 U.S. 234, 241 (1999) (holding that where "postdeprivation state-law remedies [are] sufficient to satisfy the demands of due process and the laws [are] public and available, . . . the State [need not] provide further information about those procedures").[7]

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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[7] The same result would obtain if the requirement for just compensation applies to states via the Privileges or Immunities Clause ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). Just as respondent has not deprived petitioner of due process, so too has it not abridged respondent's privileges or immunities. The Pennsylvania compensation statute satisfies the obligations of the state and its subdivisions. *Cf.* U.S. Br. 8-16 (arguing that the Just Compensation Clause does not require contemporaneous compensation).